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January 18, 2002

VIA FACSIMILE AND FIRST CLASS MAIL

Renata Hesse, Esq.
Trial Attorney
Department of Justice
Antitrust Division
601 D Street NW, Suite 1200
Washington, D.C. 20530

Re: ***United States of America v. Microsoft Corporation*, Civil Action No. 93-1232 (CKK) (D.D.C.); *State of New York ex. rel. Attorney General Eliot Spitzer, et al. v. Microsoft Corporation*, Civil Action No. 98-1233 (CKK) (D.D.C.)**

Dear Ms. Hesse:

Pursuant to 15 U.S.C. § 16(b) and the Notice of Revised Proposed Final Judgment, 66 Fed. Reg. 59452 (Nov. 28, 2001), *The New York Times*, through its undersigned counsel, hereby submits the following comments relating to the revised proposed Final Judgment pending in the above-referenced matters.

Under the Antitrust Procedures and Penalties Act (the "Tunney Act"), Microsoft Corporation ("Microsoft") was required to file, within ten days of the filing of the revised proposed Final Judgment, "a description of any and all written or oral communications by or on behalf of [Microsoft], including any and all written or oral communications on behalf of [Microsoft], or other person, with any officer or employee of the United States concerning or relevant to such proposal." 15 U.S.C. § 16(g). The only communications excepted from this requirement are those made by Microsoft's "counsel of record alone with the attorney general or the employees of the Department of Justice alone." *Id.*

The revised proposed Final Judgment in the above-referenced actions was filed November 6, 2001. On December 10, 2001, Microsoft filed a "Description of Written or Oral Communications Concerning the Revised Proposed Final Judgment and Certification of Compliance Under 15 U.S.C. § 16(g)" (the "disclosures"), a copy of

which is enclosed for your convenience, that purports to satisfy the Tunney Act's disclosure requirement.

Microsoft's disclosures are insufficient for several reasons. First, with respect to the referenced October 5, 2001 meeting regarding "technical questions," Microsoft indicates that its counsel met with "representatives of the United States and the plaintiff States" but does not identify those "representatives" or the departments or agencies for which they work. Moreover, although Microsoft indicates that Linda Averett, Michael Wallent, Robert Short and Chad Knowlton attended this meeting, it does not indicate what positions these persons hold at Microsoft or the purpose of their attendance at the meeting. Nor does Microsoft describe the substance of the October 5 communications or indicate specifically where they took place.

Similarly, with respect to the referenced meetings that occurred between September 27 and November 6, 2001, Microsoft has not disclosed the names of those counsel for Microsoft, the United States, and the plaintiff States who attended;[1] the specific dates and locations of those meetings; which of those meetings were attended by Professor Eric Green and Jonathan Marks; and which of those meetings were attended by Will Poole. Nor has Microsoft described in even the most cursory fashion the substance of any of these communications.

In addition, it appears that Microsoft may not have made all of the disclosures required. The only exception to the disclosure requirement is for communications between counsel for Microsoft alone and the attorney general or employees of the Department of Justice alone; *any* other communications between the government and Microsoft or others on Microsoft's behalf concerning or relevant to the disposition of these actions – even those in which no counsel participated – must be disclosed. *See* 15 U.S.C. § 16(g). The communications disclosed by Microsoft appear to each involve its

[1] This shortcoming is significant. As Senator Tunney explained, the "limited exception for attorneys representing the defendant who are of record in the judicial proceeding . . . is designed to avoid interference with legitimate settlement negotiations between attorneys representing a defendant and Justice Department attorneys handling the litigation. . . . [T]he provision is not intended as a loophole for extensive lobbying activities by a horde of 'counsel of record.'" 119 Cong. Rec. 3451 (1973). The report on the Tunney Act issued by the House Committee on the Judiciary further clarifies that the limited exception to disclosure "distinguishes 'lawyering' contacts of defendants from their 'lobbying contacts.'" H.R. Rep. No. 93-1463, at 9 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6535, 6540, 1974 WL 11645.

counsel of record. This fact, coupled with the absence of any meaningful description of the communications and the lack of any express disclaimer of the existence of communications with the government *not* involving counsel of record, renders it impossible to determine whether Microsoft has complied with Section 16(g).

According to the House Report, the Tunney Act was intended "'to encourage additional comment and response'" by the public to proposed consent decrees "'by providing more adequate notice to the public.'" 1974 U.S.C.C.A.N. at 6538 (quoting S. Rep. No. 93-298, at 5 (1973), *reprinted in* 9 Earl W. Kintner, *The Legislative History of the Federal Antitrust Laws and Related Statutes* 6598 (1984) ("Kintner")). "*[E]ffective* and *meaningful* public comment is also a goal." *Id.* (emphasis added). In addressing Section 16(g) specifically, the House Report emphasized that Congress "intend[ed] to provide affirmative legislative action supporting the fundamental principle restated by the Supreme Court . . . [that it] 'is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" *Id.* (quoting *United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 565 (1973)); *see also* Kintner, at 6600 ("antitrust violators wield great influence and economic power," and "additional comment and response" from the public would alleviate much of the "significant pressure" violators could often "bring . . . to bear on government, and even on the courts, in connection with handling of consent decrees"). Indeed, when Senator Tunney first introduced his bill, he focused on the significance of the disclosure provision. "Sunlight is the best of disinfectants," he explained (quoting Justice Brandeis), and thus "sunlight . . . is required in the case of lobbying activities attempting to influence the enforcement of the antitrust laws." 119 Cong. Rec. 3453. The disclosure provision was only slightly altered before passage, and the amendments were designed "to insure that no loopholes exist in the obligation to disclose all lobbying contacts made by defendants in antitrust cases culminating in a proposal for a consent decree . . . ." 1974 U.S.C.C.A.N. at 6543.

The New York Times respectfully submits that Microsoft's disclosures are inadequate to serve these statutory purposes, *i.e.*, to assure the Court and the public that the parties agreed upon the revised proposed Final Judgment at arms length and without the exertion of any improper or undue influence. The public has a statutorily recognized right to information sufficient to make this determination. For this reason, *The New York Times* respectfully suggests that Microsoft should be required to supplement its disclosures to: (1) identify the location, date and, where possible, time of each communication; (2) identify the names and titles of all persons present for each communication; (3) state the purpose of the participation in each communication by those other than counsel of record; (4) describe the substance of each communication;

(5) disclose any other required communications, if necessary; and (6) certify that there exist no further communications required to be disclosed.

Sincerely,

LEVINE SULLIVAN & KOCH, L.L.P.

By _____
Lee Levine
Jay Ward Brown

Enclosure

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1232 (CKK)
STATE OF NEW YORK *ex. rel.* Attorney General ELIOT SPITZER, *et al.*, Plaintiffs, v. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1233 (CKK) Next Court Deadline: March 4, 2002 Status Conference

DEFENDANT MICROSOFT CORPORATION'S DESCRIPTION OF WRITTEN OR ORAL COMMUNICATIONS CONCERNING THE REVISED PROPOSED FINAL JUDGMENT AND CERTIFICATION OF COMPLIANCE UNDER 15 U.S.C. § 16(g)

In conformance with Section 2(g) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(g), defendant Microsoft Corporation ("Microsoft") respectfully submits the following description of "any and all written or oral communications by or on behalf of" Microsoft "with any officer or employee of the United States concerning or relevant to" the Revised Proposed Final Judgment filed in these actions on November 6, 2001. In accordance with the requirements of the APPA, this description excludes

only "communications made by counsel of record alone with the Attorney General or the employees of the Department of Justice alone."

(1) Following the Court's Order dated September 27, 2001, and continuing through November 6, 2001, counsel for Microsoft met on a virtually daily basis with counsel for the United States and the plaintiff States in Washington, D.C. After the Court appointed Professor Eric Green of Boston University School of Law as mediator on October 12, 2001, Professor Green and his colleague Jonathan Marks participated in many of those meetings. From October 29, 2001 through November 2, 2001, Will Poole, a Microsoft vice president, also participated in some of the meetings.

(2) On October 5, 2001, counsel for Microsoft met with representatives of the United States and the plaintiff States in Washington, D.C. to answer a variety of technical questions. Linda Averett, Michael Wallent, Robert Short and Chad Knowlton of Microsoft attended this meeting, as did Professor Edward Felten of Princeton University, one of plaintiffs' technical experts.

Microsoft certifies that, with this submission, it has complied with the requirements of 15 U.S.C. § 16(g) and that this submission is a true and complete description of such communications known to Microsoft.

Dated: Washington, D.C.
December 10, 2001

Respectfully submitted,

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